NTSB Order No.
EM-40

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.,
on the 1st day of November 1974.

CHESTER R. BENDER, Commandant, United States Coast Guard,

vs.

JOHN THOMAS

Docket ME-37

ORDER DENYING PETITION FOR RECONSIDERATION

The Commandant has filed a petition for reconsideration of NTSB Order No. EM-34, adopted on May 29, 1974. The Board found therein that appellant had been denied due process by the Coast Guard's continuing custody of his marine engine's license since the date preceding his hearing before the administrative law judge. The Board therefore reversed the Commandant's decision in Appeal No. 1970 and directed that the order of the law judge, affirmed therein, revoking appellant's license and merchant mariner's document for incompetence, be vacated and set aside. Appellant has submitted a reply opposing the petition.

The initial argument in the petition is that affirmance of the Commandant's decision is required on reconsideration because the Board "acknowledges" the sufficiency of the evidence concerning appellant's mental incompetence. This is supported by the following rational: (1) Due process would be satisfied by the Coast Guard's restoration of appellant's license, and the proceeding may then be reinstated; (2) the same evidence would be adduced at the rehearing and "the results would be the same"; and (3) such a rehearing would thus be "a nugatory act and celebrate the victory of formalism over substantial due process." We concur only in the first of these propositions.

Our prior decision did not order the restoration of appellant's license, since it is being withheld under a regulatory procedure which is separate and independent of the hearing process. Rather, we held that appellant could not by this regulatory means be deprived of his license pending the outcome of the hearing without his consent. If the license is now relinquished to

appellant, the impediment to holding a rehearing of the incompetency charge is removed. However, fairness to the appellant also dictates that the mental incompetency charge be heard de novo.

We determined that the prior record would support a finding "that appellant was incompetent to perform the required duties of a third assistant engineer due to mental incapacity...." However, this pertained to his period of service aboard the SS DE SOTO from May 14 to August, 1969. Moreover, it was based largely on medical evidence attributing the incapacitation to "intermittent paranoid delusions." The prognosis given indicated that the affliction was not necessarily permanent, and the law judge concluded: "Had [appellant] been willing to be hospitalized or even to continue an out-patient regimen, psychiatry and meditation offered some hope of improvement in his ideation and possibly even control." We see no reason on review of this record for joining in the Commandant's assumption that a mental disorder in 1969 should preclude appellant's resumption of marine engineering duties indefinitely. Nor do we agree that revocation by a second law judge, after holding a full evidentiary hearing with the renewed opportunity for appellant to be heard in his own defense, is necessarily foreordained by the evidence presented heretofore.

We disagree in particular with the notion expressed in the third proposition that procedural due process may be disregarded so long as the evidence supports a finding of incompetence. The Coast Guard instituted this proceeding pursuant to 46 U.S.C. 239(g). The statute authorized the sanction to be imposed only after "...the person whose conduct is under investigation shall be given reasonable notice of the time, place, and subject of such investigation and an opportunity to be heard in his own defense." It conferred no authority to suspend, in effect, appellant's license during the course of his hearing.

The second argument of the petition is that the Commandant had no opportunity "to brief the irrelevance" of the judicial precedent cited in our prior decision. This was In re Dimitratos,[1] which is specifically applicable to Coast Guard proceedings under 46 U.S.C. herein is inescapable, for it states:

> "Respondents are entitled to due process before their licenses are cancelled. That is provided in section 239(g) of 46 U.S.C.A. Under this section, even where the charge is that the seaman's conduct endangers life or public safety he must be afforded a hearing and an opportunity to be heard in his own defense before he may be deprived of his license. No

[1]91 F. Supp. 426 (N.D. Calif., 1949).

administrative regulation may change these statutory guarantees."[2]

Moreover, this judicial interpretation simply confirms our own view of the plain meaning of the statute. The Coast Guard failed to file a brief on appeal and now seeks a "rescission" of the Board's prior order before submitting an analysis of the claimed irrelevance. We do not find the bald assertion persuasive and we are not disposed to extend this appeal proceeding for the sake of further elaboration.

We also reject the final argument in the petition challenging as inappropriate our finding that the medical evidence of record falls short of supporting the sanction. To repeat what we have stated recently in disposing of the Commandant's petition in another case: "It is our adjudicative role to make the ultimate determinations as to whether the law judge's findings...are adequately based on the record and warrant the sanction imposed by him."Commandant v.Neilson, [3] in our opinion, therefore, the petition is devoid of grounds justifying reconsideration of Order No. EM-34.

ACCORDINGLY, IT IS ORDERED THAT:

1. The petition for reconsideration filed by the Commandant be and it hereby is denied.

McDAMS, THAYER, BURGESS, and HALEY, Members of the Board, concurred in the above order. REED, Chairman, did not participate.

(SEAL)

---

[2]Id at 429.

[3]Commandant v.Neilson, Order EM-36, adopted July 31, 1974.